BLANK PAGE

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 381.

Z. & F. ASSETS REALIZATION CORPORATION, a Delaware corporation; AMERICAN-HAWAIIAN STEAMSHIP COMPANY, Intervener,

Petitioners,

v.

CORDELL HULL, Secretary of State, and HENRY MORGENTHAU, Secretary of the Treasury; LEHIGH VALLEY RAILROAD COMPANY, Intervener,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

BRIEF OF THE PETITIONER, Z. & F. ASSETS REALIZATION CORPORATION, IN REPLY TO BRIEF OF INTERVENER-RESPONDENT, LEHIGH VALLEY RAILROAD COMPANY.

FRANK ROBERSON,
HUBERT E. ROGERS,
JOHN F. CONDON, JR.,
Attorneys for Petitioner.

JOHN BASSETT MOORE,
JOSEPH M. PROSKAUER,
Of Counsel.

BLANK PAGE

TABLE OF CONTENTS.

Cases Cited:

Authorities Cited:

Statutes and Treaties Cited:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 381.

Z. & F. ASSETS REALIZATION CORPORATION, a Delaware corporation; AMERICAN-HAWAIIAN STEAMSHIP COMPANY, Intervener,

Petitioners,

v.

CORDELL HULL, Secretary of State, and HENRY MORGENTHAU, Secretary of the Treasury; LEHIGH VALLEY RAILROAD COMPANY, Intervener,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

BRIEF OF THE PETITIONER, Z. & F. ASSETS REALIZATION CORPORATION, IN REPLY TO BRIEF OF INTERVENER-RESPONDENT, LEHIGH VALLEY RAILROAD COMPANY.

The issues were so fully discussed in our main brief that we limit our reply to a few observations.*

Intervener-respondent assumes that awards were made by a regularly constituted Commission, and that *therefore* any interference with its awards would be a political and *therefore* not a justiciable question. But if we are correct in our contention that a regularly constituted Commission never acted, in other words, that no awards

* We annex hereto, as Appendix A, a chronology of important dates.

were ever made, the conclusion falls with the incorrectness of the premise.

It is contended at length that an international arbitral tribunal has the authority to pass upon its own jurisdiction. We have not argued that it may not do so in the first instance; we have, however, maintained that it cannot by its own fiat endow itself with jurisdiction not bestowed upon it by the charter which has created the Commission. *Hanna* v. *Stedman*, 230 N. Y. 326, 336.

On page 72, the respondent-intervener has quoted only a part of Judge Moore's statement on the subject of whether the withdrawal of a commissioner is unjustified under international law. The answer of Judge Moore annexed hereto as Appendix B, conclusively proves that the Commission created under the Jay treaty was halted in its work by reason of the withdrawal of the British Commissioners. This is recognized on page 29 of the brief filed by the Government-respondents as follows:

> "From the time of the Jay treaty of 1794 to the present date, controversies between the United States and a foreign power as to the jurisdiction of a commission or umpire appointed to arbitrate disputes between the two nations have been settled by negotiations between the diplomatic representatives of the respective governments. The claim of the British commissioners of authority to withdraw from the commission established by the Jay treaty and thus to prevent the commission from functioning was settled in this manner. Moore's Arbitrations, pp. 321-324; Moore's Digest VII, p. 33."

The agreement which created the Mixed Claims Commission provided for the filling of vacancies in any event (R. 17). The motive for retirement is immaterial.

Other fallacies of the intervener-respondent's arguments may be emphasized by brief reference to certain statements in their brief which we believe to be either inaccurate or instinct with erroneous innuendo:

(1) The statement at page 3,* that

> "The commission consisted of two national commissioners and an umpire. Unanimity was not required. The concurrence of two was sufficient for a decision."

This statement is inaccurate, in that by the express terms of Article VI of the agreement between the United States and Germany of August 10, 1922, which provided:

> "The decisions of the commission and those of the umpire (*in case there may be any*) shall be accepted as final and binding upon the two Governments" (R. 18)

the Commission consisted of two commissioners, one appointed by each Government, who, except where they differed, were competent to transact the entire business of the commission. The function of the umpire was to decide cases or points concerning which the commissioners disagreed. In no sense could one of the commissioners and the umpire be said to constitute the commission, and to have the power to act as the commission when one of the commissioners was absent, and still less after one of the commissioners had withdrawn.

In elaborating the contention above stated, the brief further says that the question arises whether the "attempt of Germany to frustrate the arbitration was effective to prevent the umpire and American commissioner from proceeding to dispose finally of the cases", that

* Page references are to respondent-intervener's brief unless otherwise noted.

"Germany argued that it was effective", and that "the two remaining members of the commission considered this question and held they had the power, and exercised it". Here again we have in precise terms the theory and the claim that the "attempt" of one party to "frustrate the arbitration" clothed the commissioner of the other party and the umpire with all the powers of the commission. Probably such a contention never was made before. If it was, we may assume that the precedent would have been cited.

(2) The brief of intervener-respondents contains at page 3, the following statement:

> "The commission (with its membership then full) held in 1933 that it had power to re-open the cases. In 1939, after continuous litigation since 1933 and the production by both Governments of masses of further evidence, the Commission set aside the 1930 decision, held Germany responsible for the Black Tom and Kingsland destructions, and entered awards on the sabotage claims."

The fact is that the Umpire (not the Commission) held in 1933 that the Commission had the power to reopen if the former decision had been induced by fraud, in spite of the statement of the German Government that "The German Government regards the Commission as being without authority to pass upon a difference of opinion which may exist between the two Governments in this connection" (R. 90, 229, see pp. 67 to 70 of our main brief).

In saying that "the Commission * * * held Germany responsible for the Black Tom and Kingsland destructions, and entered awards," not only does the brief lack the precision essential to an understanding of the case, but it wholly evades the very question at issue, namely, whether

the so-called awards were made by the Mixed Commission for which the agreement between the two Governments provided.

By the express terms of the agreement, the essential constituents of the commission were the two commissioners, one appointed by each Government. This is precisely what was meant by calling it a "Mixed Commission," and if anything beyond common usage and understanding were needed to demonstrate the fact, it would be found in Article VI of the agreement quoted above. Had the two commissioners always agreed, there need not have been an umpire. The umpire was not a commissioner, nor could he in any event take the place of a commissioner or act as a commissioner. In no case and in no sense could he be considered as the United States or as the German commissioner. Nevertheless, the brief for Intervener-Respondent now in effect takes the ground, which, in order to sustain its thesis, it is obliged to assume, that the umpire could at one and the same time play the part both of umpire and German commissioner, and thus, after the German commissioner's withdrawal, make awards in cases that were previously pending (See pp. 67-70 of our main brief).

(3) The brief for intervener-respondent raises the question (p. 6) whether it is "open to any private citizen to question an award which is acceptable to the United States", as well as the question whether either Government has 'contemplated or consented that the decisions of the Commission are subject to review in the domestic courts of either country." In answer to this inquiry, it may suffice to say that those who are seeking relief in the present judicial proceeding are not asking for a judicial review of the decisions of an international commission but are appealing to the courts for

the protection of their interest in a fund which is in the possession of the United States and which has been held in such possession for the satisfaction of the claims of persons who owe permanent allegiance to the United States and who have suffered through the acts of the Imperial German Government, or its agents, since July 31, 1914, loss, damage, or injury to their persons or property. These are the precise terms of the Knox-Porter Resolution which was incorporated in the treaty between the United States and Germany concluded at Berlin on August 25, 1921. It was for the purpose of carrying out this Resolution that the agreement of August 10, 1922, for the creation of a Mixed Commission was concluded between the United States and Germany. By the Settlement of War Claims Act of 1928 it was made the duty of the Secretary of State to certify to the Secretary of the Treasury, from time to time, the awards of the commission and the Secretary of the Treasury was authorized and directed to pay such awards. The Act was passed for the purpose of keeping the matter within the domain of law, to the end that the claimants, who were citizens of the United States, might assert and protect their pecuniary rights by legal action, whether administrative or judicial.

The Secretary of State, in his reply of October 18, 1939 (R. 217), to the protest of the German Embassy against the assumption of the American Commissioner and the umpire to discharge the functions of the commission, said that he must content himself with stating that, as the Department had no jurisdiction over the commission, it would be highly inappropriate for him to intervene in any way in the matter, but added that he had "entire confidence in the ability and integrity" of the umpire and the American Commissioner and that the "remarkable action" of the German commissioner in with-

drawing "was apparently designed to frustrate or postpone indefinitely the work of the Commission." In saying this, the Secretary of State clearly refrained from expressing any opinion of his own as to the legality or the propriety of what the American commissioner and the umpire were doing. Should such an expression as this be regarded as precluding citizens of the United States from appealing to the courts for the protection of their legal rights, this would in effect mean that the action of the American commissioner and the umpire was to be treated by all the authorities of the United States as conclusively establishing its own legality. Such could not have been the intent, because, if the purpose of Congress was to make the certificate of the Secretary of State conclusive, it would have used the same language as in Section 8 of the Settlement of War Claims Act which specifically declares "that decisions by the Secretary of the Treasury in respect of payments from the funds are 'final and conclusive and * * * not * * * subject to review by any other officer of the United States * * *'" (see p. 43 of Government-Respondents' brief).

The fact that the Secretary of State referred the subject matter of the aforesaid protest to the so-called Commission, is a clear indication that the Secretary of State did not consider himself authorized *at any time* to function judicially and, therefore, the certificate must be regarded as a purely ministerial act.

(4) It is contended by the respondent-intervener (at pp. 35 *et seq.*) that the controversy herein is entirely an intergovernmental affair, and as basis for such contention it is argued that the ownership of these claims is in the United States. It is a misuse of the word "ownership" to attribute the same to the Government. The Government concedes that the private claimants are the real parties in interest. Judge Parker in his Opinions and

Decisions (pp. 186, 192) has emphasized this fact. The courts, therefore, ought not to be misled by the formal approval of the United States to conclude that this is exclusively an inter-governmental matter. This would be to allow form to conceal or repudiate the substance. The substance is that these are private claims against the German Government. It was for these private claimants that the Knox-Porter Resolution was passed. It was for the private claimants that the Government entered into an agreement with Germany to execute the terms of the Knox-Porter Resolution. To now project the United States Government as the exclusive party in interest and then to claim that the challenge of the award is to defeat and impair the interest of the United States, is a distortion. ~~so great as to amount to a misrepresentation.~~ The United States is nothing but a protector, an agent, to present the claim of a private claimant. Before an arbitration it is actually, as Judge Parker said, "a private claim" in which the United States is merely the formal American citizen. It is inconceivable that the United States would retain for itself an award made on behalf of a citizen. That it could technically do so, because it can only be sued as Congress permits, is beside the point. But the fact is that the United States would never think of pocketing the award, and the Act of 1896 considers the United States in collecting the award as a trustee.

It is for these reasons that the argument, so patriotically presented, to the effect that this is a claim of the United States with which no court may interfere and that only the Executive can determine whether the other American claimants have been wronged is a misrepresentation and thoroughly misleading. No tribunal should be deceived by this argument.

The petitioners derive their interests "from an Act of Congress", as the intervener-respondents admit (p. 36).

The agreement itself is the execution of an Act of Congress. The petitioners would be deprived of their rights under the Act of Congress if an illegal award is handed down on behalf of said claimants.

On the finality of the award the respondents explain that finality means to foreclose a review by any other tribunal but not by the arbitral tribunal that rendered the award. This is an error. The finality of the award was designed to prevent the United States or the claimant on behalf of whom they speak, from ever opening the argument. It was also designed to foreclose the defendant government from questioning the award. Not in any respect did it look to the invocation of private rights before a domestic tribunal. That is an independent matter with which the agreement had nothing to do. The sabotage claimants concede that the new award is final, but not the Hamburg award.

This, therefore, is not a political question between the two governments. This is a contest between private claimants, both citizens of the United States. It is only in that formal sense that the American Agent entered the picture. The Department of State itself took no interest in these claims and repeatedly refused to heed complaints made with respect to the functioning of the American Agent. To now assert that the foreign policy of the United States would be upset and impaired by an examination of the formal validity of such unilateral awards as were handed down by the two Americans on the Commission is to misrepresent the facts and the law.

(5) The statement at page 15, that

> "The two governments acted upon that decision [of 1933]"

omits the qualifying statement that the further proceedings were taken under the unanimous decision of

both commissioners and umpire, stating, *in haec verba* and to meet Germany's claim of usurped power, that the proceedings were limited solely to the question of a rehearing of the motion to set aside the old awards and not to a hearing on the merits (p. 70 of Our Main Brief). In connection with this 1933 decision and subsequent proceedings, it should be noted that the umpire in acting had before him a letter of the then acting German agent, quoted in the following excerpt from the minutes of the meeting of October 30, 1933 (R. 229):

> "'It is understood that it is the position of the German agent that he is not authorized to take any part in this proceeding, and the umpire further stated that the umpire will be entirely willing to receive any observations or representations the German agent may wish to make in the pending matter, and he is willing to receive such as in the nature of a special appearance and is not conceding anything and without prejudice to the position of the German Agent's Government before the commission.'"

(6) The statement on page 15 that the German Agent was given opportunity by a special order of the Commission of December 1, 1937 to file any evidence he desired, and that he exercised this privilege, may be misleading if divorced from the fact that the Umpire himself recognized the then existing reservation that evidence as to the merits was to be considered only as bearing on the motion for a rehearing and not as to the propriety of any new award. Evidence was presented only after a recognition by the entire Commission that such presentation would be without prejudice, as appears from the excerpt from the Minutes of the meeting of October 30, 1933 just quoted (R. 229). In view of this reservation, said evidence must be regarded as presented without prejudice in accordance with the practice recognized in

Harkness v. *Hyde*, 98 U. S. 476, and *Blaudin* v. *Ostrander*, 239 Fed. 700.

(7) If the statement on page 23 attributed to Mr. Garnett, to the effect that at the conferences prior to the retirement of the German Commissioner, the German Commissioner had invited a decision on the merits of the sabotage claims, is intended to convey anything more than Mr. Garnett's own conclusion, it is erroneous. We are certain, however, that Mr. Garnett's statement was not intended by him to be a statement of evidentiary fact, and was no more than his own personal conclusion drawn from record facts, about which there is and can be no dispute. If it be claimed that Mr. Garnett's statement is entitled to any greater weight, the motion for summary judgment was improperly granted, since we would be entitled to cross examine Mr. Garnett upon the statement attributed to him, and we are certain that upon any such cross examination Mr. Garnett would be the first to agree with our construction of said statement. Mr. Garnett's statement is presumably based upon the request made by the German Commissioner to the effect that in order to ascertain whether the application for rehearing should be granted, the Commission should first ascertain whether the sabotage claimants had themselves presented such fraudulent evidence as to disentitle them to a rehearing. In other words, what the German Commissioner suggested was that, if the sabotage claimants had come before the Commission with evidence based on fraud and perjury such as had been found to be the case in the decisions of October 1930 and December 1932, then the sabotage claimants had not made a *prima facie* case and would not be entitled to a reopening. Many times on an application for a new trial the question arises whether a different result would be obtained

if a new hearing were granted, and if the testimony already presented by the moving party is permeated with fraud and perjury; the granting of a new trial would be wholly unwarranted. This does not imply that if a rehearing is granted, the party opposing the trial may not present such additional evidence upon such new trial as to defeat the party moving for such rehearing.

(8) The statement at the top of page 26 of the Lehigh Valley brief that "The motions [to which the Umpire referred on June 15, 1939] were motions to reopen" is a concession that the Umpire did not accept the request of the American Agent to decide the merits, and is further proof that the merits were not before the Commission at the time of the retirement of the German Commissioner.

(9) The mere fact that in May, 1934, by exchange of notes (referred to on p. 62 of Respondent-Intervener's Brief), it was mentioned that the sabotage claims were still pending, does not signify any assent on the part of the German Government that the Commission had jurisdiction to rehear the claims.

The fact is that Dr. Kiesselbach, the German Commissioner, had expressly stated that, as the decision of 1930 was final and binding, the Mixed Claims Commission had no jurisdiction to reopen and jurisdiction could not be conferred to do so, except by a new agreement between the two governments (Report of American Commissioner, Dec. 30, 1933, p. 53).

Furthermore, the following rule of the Commission was violated (R. 209):

> "If any member of the Commission considers a point not orally argued one which should be taken into account in the Commission's decision, counsel's

attention will be called thereto during the progress of the argument or subsequent thereto, and counsel for both parties will be given an opportunity to discuss same on the oral argument or to file written or printed briefs within a time to be fixed by the Commission covering such particular point or points."

If the Umpire and the American Commissioner concluded on June 15, 1939 that the motion of the American Agent for awards should be granted, then under the terms of the last quoted rule, the German Agent's attention should have been called thereto by the Commission. It appears that the German Agent, in the light of the agreement made with the American Agent in the years 1927 and 1928, never submitted any counter-proof on the question of damages; and the amount of damages, therefore, was arrived at entirely *ex parte* and solely on the basis of what the lawyers for the American and Canadian parties had submitted (R. 212).

(10) The statement in the footnote on page 26, that

"The claimed distinction between the issues of German fraud and German liability had become unreal,"

fails to point out that the German commissioner had insisted at every step of the proceeding that there was a real distinction between these issues and the proceedings necessary for their determination, and that the umpire himself had acquiesced in that position. See page 70 of our main brief, where we quote the umpire's statement that

"If the parties were in agreement that this course should be followed, the commission would acquiesce. There is no such agreement. Germany insists that the preliminary question be determined separately. *I am of opinion this is her right.*" (Italics ours.)

(11) The statement on page 16 that the rule of the Commission requiring a certificate of disagreement signed by both commissioners had been "held in the decision of the commission of December 15, 1933 to have been adopted merely for the convenience of the Commission and not to be essential if there was in fact a disagreement", fails to point out that this decision was not by the Commission at all but merely by the umpire who was making that decision purportedly on behalf of the Commission over the protest of the German commissioner (see p. 11 of our main brief).

(12) On page 82 it is stated that years ago the Commission held that the rule providing for a written certificate of disagreement was contrary to the agreement of August 10, 1922. The agreement of August 10, 1922 is silent as to how the disagreement should be evidenced. The mere fact that the agreement was silent does not preclude the Commission from making rules which have, as far as the Commission is concerned and the parties before it, the force of law. In view of the facts that the agreement is silent and that the rules so established are not inconsistent with the provisions of the agreement, the rules are binding and the statement contained in the Umpire's decision that these rules need not be observed is unjustified in law.

(13) It is further contended on page 63 that the Commission was a continuing body and that, therefore, the previous decisions remain subject to modification by later rulings of such Commission. An examination of the copies of the awards in the Decisions and Opinions indicates that each award is a decision in a separate claim. As previously stated, some of the awards were the result of rulings of the two National Commissioners, and it cannot be the case that these previous awards were subject

to reopening by two other Commissioners functioning years afterwards.

(14) On page 30 issue is taken with our statement that the amount of the damages was fixed *ex parte*. We have never claimed that evidence had not been submitted which might have been relevant on the amount of the damage, if that issue had been properly before the Commission. All we have claimed, and this much cannot be disputed, is that such evidence was adduced at a time when all the parties had agreed that the only issue before the Commission was the propriety of granting the motion to reopen the prior dismissals. The issue as to the merits or as to the amount of the alleged damage was not before the Commission. This was recognized by all the parties, and no evidence on the issue of damage was ever presented to the Commission by the German Agent. Under the circumstances, we feel that our statement that the fixing of the amount of the damages was *ex parte* is justified (see p. 6 of our main brief).

(15) The statement on page 32 that "The evidence on damages was carefully sifted and the awards were some $2,000,000 less than the claims presented by the United States (R. 82, 63-73)," infers that the evidence as to damage had been carefully sifted as a litigated issue. As a matter of fact, however, the contrary was true. The motion of the American Agent asking for the issuance of awards having been made on June 15, 1939, and granted on that day, could not have been litigated or discussed by both Commissioners at any stage (R. 214), nor could it have been the subject of any exchange of opinion between the two National Commissioners.

(16) The statement on page 8, purporting to set forth the origin of the funds of the German Special Deposit

Account, omits the Congressional appropriation of more than $86,000,000, as stated in our main brief, page 30.

(17) The statement on page 9 that "Germany agreed to replenish the Special Deposit Account" is inaccurate, in that Germany merely agreed to make certain payments to our Government and that said payments were, by Act of Congress, turned over to the Special Deposit Account.

(18) The statement on page 12 that the Commission in its decision of October 16, 1930 found "that Germany had authorized sabotage in the United States, but that the United States had failed to prove that Germany had caused the destruction at Black Tom and at Kingsland", fails to mention the Commission's findings that the evidence presented by the sabotage claimants was permeated with perjury and fraud and bribery of witnesses. For example:

> "Hilken and Herrmann are both liars, not presumptive but proven. No one could in the light of all their evidence believe anything either says unless something other than his own assertion confirmed his statements. Hilken's first long and detailed statement in these cases contained nothing of what he now says in respect to Kingsland. He had previously testified before the Alien Property Custodian and had lied continuously. In his first statement for the Commission he professes his willingness to tell the entire truth. If he did, there can be no truth either in his or Herrmann's present story" (R. 265).
>
> • • •
>
> "We do not imply or think that anything improper was done to induce him to testify, merely that it is sufficiently obvious that Herrmann would not have turned his coat if the German Government or the German Legation in Chile had offered him appro-

priate inducements, and that having turned his coat because of advantage to himself he is pretty sure to be in a mental attitude in which hostility to Germany and desire to make good with the claimants play a substantial part. And there is nothing about Herrmann of which we feel so sure as that he will lie if he thinks lying worth while from his own point of view" (R. 266).

(19) The intervener-respondent claims at pages 75-77 of its brief, that the statement of Judge Parker, the Umpire, to the effect that he would insist upon a decision of the sabotage claims, no matter what Germany might do, showed an intent of the Congress that a subsequent umpire years later might compel the German Government to abide by the re-opening of the claims and the making of new awards, is hardly justified.

Assuming *arguendo* that the proceedings before the Congressional Committee were sufficient to show a Congressional intent that *an* award should be made *in the first instance*, they hardly warrant the assumption that after such an award had been made, it might be set aside and new awards substituted in their place.

What Mr. Boles, on behalf of the sabotage claimants, besought the committee to effectuate was to prevent the return of any German property until after the disposition of the sabotage claims. Judge Parker's answer (at p. 202) was that he thought the Boles amendment unnecessary; and the facts justified his belief, since the Commission did dispose of the sabotage claims in 1930. The colloquy before the committee, directed toward the desirability of the Boles amendment, can hardly be tortured into support for the claim that the Congress intended the Commission to function indefinitely after the disposition of these claims.

(20) In connection with the claim on page 74, that the Settlement of War Claims Act was enacted in reliance "on assurances from Germany that she would not impede or obstruct the Commission in the disposal of these very sabotage cases", it is relevant to point out that Germany submitted these sabotage cases to the Commission who, in dismissing the claims, pointed out that fraud and perjury had permeated the evidence submitted by the sabotage claimants (R: 265).

(21) At pages 73-74 it is urged that Germany should not be permitted to frustrate the arbitration by withdrawing her commissioner, because "The Settlement of War Claims Act" of 1928 (45 Stat. 254) was enacted in reliance upon the fact that the Commission had been established. The history of its enactment, however, does not support the claim of estoppel or reliance. The Act provided for the return of seized property to its former German owners, and not to Germany; and there was in fact no such reliance as claimed.

The enactment of the Act was based upon the policy of the United States, from the time of its existence, that there should be no permanent confiscation of enemy property (Senate Report No. 273, 70th Cong., 1st Session, p. 12) together with the desire to satisfy legitimate claims of citizens of the United States against Germany (*Deutsche Bank* v. *Cummings*, 83 Fed. (2) 554, 560, reversed on other grounds 300 U. S. 115).

The Settlement of War Claims Act was, in fact, based upon an agreement made between former German owners of property and a committee of American nationals having claims against Germany (Hearings, Committee on Finance, Jan. 8, 1927, 69th Cong., 2d Session, p. 129).

Since 1925, the Treasury Department had insisted that the institution of private property and the protection of

American private property abroad, made it essential that the sequestrated private property be returned in full to its owners (see Document No. 191, 69th Cong., 2d Session).

An Administration bill to this effect was introduced in 1926. The American claimants against Germany, however, felt that if the property were returned in full there would be insufficient funds with which to pay any considerable percentage of their claims. They therefore opposed immediate return in full, and advocated a compromise. The American claimants agreed that the owners of claims under $100,000 should be paid in full, whereas the balance of the large claimants would accept $100,000 plus a sum sufficient to make up 80% of the total awards. For the balance, drawing interest at 5%, the American claimants were willing to wait.

In the Report from the Senate Committee on Finance which accompanied the Settlement of War Claims Bill of 1928 (Report #273), the following is stated (p. 4):

> "Under the terms of the bill an amount equal to 80 per cent of the aggregate of the awards entered by the Mixed Claims Commission, entered on account of claims of nationals of the United States, is to be used immediately for the payment of all death and personal injury claims awards and all awards of $100,000 or less. The balance is to be prorated among the larger awards. The above percentage was reached by an agreement between the representatives of the American claimants affected and of the German alien property owners. The representatives of the American claimants appeared before your committee and testified that the percentage was very satisfactory and that they preferred that the provisions of the bill be in accordance with the agreement. Consequently, your committee is recommending no change."

In the same Report, at page 13, there is a reference to the "suitable provision" clause in the preamble to the Treaty of Berlin, which indicates that Congress at the time of the passing of the Settlement of War Claims Act considered that "suitable provision" was thereby being made for the payment of American claims.

Consequently, there is no basis for the contention that the Settlement of War Claims Act was enacted in reliance upon the fact that the Commission had been established.

(22) In regard to the quotation from the opinion of Mr. Nielsen on page 60, the following may be stated: The quotation is from the dissenting opinion in a case before the General Claims Commission, United States and Mexico. No motion for rehearing was pending before that tribunal in that case. The Commissioner distinguished between a protest made by a Government attacking the validity of an award and a motion for rehearing made by counsel before a Commission. A ruling adopted by the Commission in 1926 reads as follows:

> "Upon the application of either Agent made within sixty (60) days after the Joint Secretaries have furnished the Agents copies of the awards or other decisions, and after giving the other Agent an opportunity to be heard, the Commission may interpret or rectify a decision which is obscure or incomplete or contradictory or which contains any error in expression or calculation or in which the two texts do not correspond." (Rules of the General Claims Commissions United States and Mexico as amended to October 25, 1926, Rule XI, par. 6.)

Pursuant to that rule, the Agents of the two Governments made some motions, conformably to which English and Spanish text were harmonized by trivial verbal changes. *Opinions of Commissioners*, 1927, pages 193-197.

In Mr. Nielsen's work, "International Law Applied to Reclamations", page 74 published in 1933, his views regarding the finality of the awards is shown by the following passage:

> *"Motions for Rehearing.*—Arbitral agreements generally stipulate the finality of awards. Disagreeable questions such as have arisen with respect to motions for rehearings of cases could be avoided by a rule of procedure providing for a period for the presentation of such motions and *expressly* withholding finality from decisions until after the lapse of the specified period."

(23) In the footnote on page 81 it is claimed that the counsel for the petitioner in No. 382, in an opinion rendered by him as Commissioner in the settlement of the American-Turkish claims, stated that the nationality of a corporation is that of the State under whose law the corporation is organized. Nothing is quoted in the brief from what precedes or from what follows that sentence. The opinion shows that the Commissioner was dealing with a claim which, it appeared, had been presented by a British company to the British Government, which disallowed it, because the British company was a wholly-owned subsidiary of an American corporation, and that the Commissioner in turn disallowed the claim because of lack of proof of American interest.

(24) On page 85 of the intervener-respondent's brief it is stated that petitioners present no affidavit from anyone assuming to have personal knowledge. In the first place, the affiant Rogers in his affidavit has stated merely record facts, except on the subject of the method of ascertaining the amount of damages and the conference in connection with the ascertainment of such damages.

On these subjects he demanded in his affidavit the examination of Mr. Martin, and that opportunity was refused him by the District Court (R. 252).

Conclusion.

In conclusion, petitioner asks for its day in court. It has never had such day in court. Its complaint has been dismissed for lack of jurisdiction. In contrast, the claims of the Lehigh Valley Railroad Company, Bethlehem Steel Corporation and Agency of Canadian Car & Foundry Company, Ltd., etc., were represented on the vital questions of whether a rehearing should be granted, the granting of awards and the quantum of damages, by their own counsel who appeared for the Government (see, also, petition for rehearing, signed by the various attorneys for the sabotage claimants, R. 121).

Respectfully submitted,

FRANK ROBERSON,
HUBERT E. ROGERS,
JOHN F. CONDON, JR.,
Attorneys for Petitioner.

JOHN BASSETT MOORE,
JOSEPH M. PROSKAUER,
Of Counsel.

Appendix A.

Chronology of Important Dates.

Oct. 16, 1930

Sabotage claims dismissed by Commission (Roland W. Boyden, Umpire, Chandler P. Anderson, American Commissioner, W. Kiesselbach, German Commissioner) (R. 260).

Mar. 30, 1931

First petition to reopen dismissed by Commission (Same Members as October 1930). The decision reads, in part, as follows (Dec. & Op., p. 995):

> "Although the rules of this Commission, *conforming to the practice of international commissions*, make no provision for a rehearing in *any* case in which a final decree has been entered, these petitions have been carefully considered by the Commission." (Italics ours.)

Dec. 3, 1932

Second petition to reopen dismissed by Umpire Roberts, after receiving a Certificate of Disagreement signed by the two National Commissioners. This Certificate, dated November 28, 1932, reads, in part, as follows (Dec. & Op., p. 1004):

> "The American Commissioner and the German Commissioner have been unable to agree upon the decision of the questions presented in these cases as aforesaid, and their respective opinions having been stated to the Umpire they accordingly certify the above mentioned cases and all the questions arising under the supplemental

petition therein to the Umpire of the Commission for decision, *except that the German Commissioner takes the position that the question of the jurisdiction of the Commission to re-examine any case after a final decision has been rendered is not a proper question to be certified to the Umpire on disagreement of the National Commissioners and reserves that question from this certificate.*" (Italics ours.)

May 4, 1933

Third petition for rehearing filed (R. 115).

Oct. 11, 1933

Letter of protest by the German Ambassador to the Secretary of State, reading in part as follows (R. 90):

"The German Government (as stated in the Embassy's note of July 6, 1933, and in my conversation on August 24, 1933, with the Acting Secretary of State, Mr. Wilbur J. Carr) considers petitions for rehearing in conflict with existing treaty provisions, as contained in paragraph 3, Art. VI of the agreement of August 10, 1922, between the United States and Germany. The German Government regards the commission as being without authority to pass upon a difference of opinion which may exist between the two governments in this connection."

Dec. 15, 1933

Decision of Umpire Roberts, after receiving a certificate of disagreement prepared by the American Commissioner at the suggestion of the German Commissioner and submitted with two opinions of the American Commissioner and two opinions of the German Commissioner which were transmitted with

a letter, which letter was quoted in the following excerpt from the minutes of October 30, 1933 (R. 229):

> "it is understood that it is the position of the German Agent that he is not authorized to take any part in this proceeding, and the Umpire further stated that the Umpire will be entirely willing to receive any observations or representations the German Agent may wish to make in the pending matter and he is willing to receive such as in the nature of a special appearance as not conceding anything and without prejudice to the position of the German Agent's Government before the Commission."

Nov. 9, 1934

Decision of Umpire Roberts upon Certificate of Disagreement by National Commissioners (Anderson, American, and Huecking, German) denying motion for bill of particulars (R. 230).

July 29, 1935

Decision of Umpire Roberts (after receiving certificate of disagreement of American Commissioner Anderson and German Commissioner Huecking), limiting question before the Commission to reopening and stating (R. 144, 231):

> "The relevancy and weight of evidence upon the comparatively narrow issue made by the petition and answer will be one thing; the relevancy and weight of evidence upon the merits, if a rehearing be granted, will be quite a different thing."

June 3, 1936

Decision of Commission (Umpire Roberts, American Commissioner Anderson and German Commissioner

Huecking) setting aside the dismissal of December 3, 1932, which dismissed, for the second time the sabotage claims and stating that this decision had "no bearing on the decision rendered at the Hague and does not reopen the cases as far as that decision is concerned" (R. 140), with the limitation that under the Commission's decision of July 29, 1935, the subject of a rehearing must "be determined by a hearing separate from and distinct from any argument on the merits".

Sept. 12, 1936

Christopher B. Garnett appointed American Commissioner in place of Anderson, deceased (R. 223).

Jan. 16, 1939

to

Jan. 27, 1939

Oral argument before Commission (Umpire Roberts, Garnett, American Commissioner, and Huecking, German Commissioner) on question whether application for rehearing, dated May 4, 1933, should be granted (R. 96, 235).

Mar. 1, 1939

German Commissioner retired (R. 104, 236).

June 15, 1939

Upon Certificate of Disagreement signed by American Commissioner only, Umpire Roberts rendered decision granting pending motion for rehearing (R. 59).

June 15, 1939

American Agent made a motion that awards be granted in favor of the United States on behalf of the sabotage claimants, which motion was granted by the Umpire on that same day (R. 105).

June 23, 1939

Letters of protest sent by petitioner to Secretary of State and Secretary of Treasury (R. 307, 309).

Oct. 25, 1939

Letters to Secretary of State and Secretary of Treasury advising that action would be commenced as soon as awards made to sabotage claimants (R. 305, 306).

Oct. 30, 1939

153 awards submitted to Umpire Roberts and American Commissioner Garnett for signature (R. 107).

Oct. 30, 1939

153 awards certified by the American Joint Secretary of the Commission to the State Department (R. 110).

Oct. 31, 1939

9:15 A. M.: Complaint in this action filed (R. 302).

Oct. 31, 1939

Complaint served upon defendants (R. 311, 332).

Oct. 31, 1939

153 awards certified by Secretary of State to Secretary of Treasury (R. 110, 312).

Appendix B.

ANSWER OF JOHN BASSETT MOORE TO STATEMENT ON PAGE 72 OF BRIEF FOR INTERVENER RESPONDENT, LEHIGH VALLEY RAILROAD COMPANY, WITH REFERENCE TO WITHDRAWAL OF COMMISSIONER IN CONNECTION WITH THE ARBITRATION WHICH TOOK PLACE UNDER THE JAY TREATY OF 1794.

By Article VI of the treaty between Great Britain and the United States of November 19, 1794, commonly called the Jay treaty, provision was made for the arbitration of claims against the United States for the confiscation of pre-war debts. For the purposes of the arbitration provision was made for the appointment of a mixed commission, to consist of five commissioners, two of whom should be appointed by Great Britain and two by the United States. The choice of a fifth commissioner was left to the four thus appointed and, if they could not agree on a choice, the fifth commissioner was to be chosen by lot.

It was further stipulated that three of the commissioners should "constitute a board," and should "have power to do any act pertaining to the said commission, provided that one of the commissioners named on each side, and the fifth commissioner shall be present, and all decisions shall be made by the majority of the voices of the commissioners then present".

The commission was duly constituted, and eventually, in the course of its proceedings, the two United States commissioners sought to prevent the entry of judgments by what were called "acts of secession," or, in other words, absenting themselves from time to time with a view to prevent the entry of awards.

A right of secession, such as that just described, had previously been claimed by the British members of a mixed commission at London, which was similarly constituted under another article of the same treaty. The

first withdrawal of the British commissioners in London was prompted by the maintenance by a majority of the five commissioners of a right to make awards on certain claims which the other two commissioners contended were not within the commission's jurisdiction.

In discussing this subject in my *International Adjudications, Modern Series,* Volume III, page 169, I stated that "the claim of a right to withdraw, as first asserted at London and afterwards at Philadelphia, for the purpose of preventing a majority of the board from acting," could, as a question of law, hardly be maintained upon the terms of the treaty, which, while stipulating that three of the commissioners should "constitute a board" and should "have power to do any act appertaining to the said commission," added the proviso that "one of the commissioners named on each side and the fifth commissioner shall be present," and that all decisions should be made "by the majority of the voices of the commissioners then present". The object of this proviso was, as I pointed out, "to prevent the commission from proceeding when either government was wholly unrepresented in the board". Commenting on this subject I said, in the volume above cited, at page 170:

> "The reasonableness of the proviso proved, as things turned out, to be specially manifest both at London and at Philadelphia. At London the fifth commissioner happened to be a citizen of the United States, at Philadelphia he happened to be a British subject; so that without the proviso, the spectacle might have been witnessed of an international board, consisting wholly of citizens or subjects of one of the contracting parties, deciding the claims made by their own compatriots against the other government. Governments are not accustomed to agree to the constitution of arbitral boards of that kind. On the other hand, it can hardly be supposed that the gov-

ernments, in agreeing to Articles VI and VII, had it in mind to create a device by which either of them, or the commissioners named by either of them, might, by withdrawing, readily prevent the majority of a duly constituted board from exercising its constitutional powers. The fact that the actual secession of the commissioners on either side, or of the fifth commissioner, would prevent the board from acting, by no means implies that it was intended to create a right of secession for the purpose of subjecting the board to the control of either government, or conceivably, to the control of the fifth commissioner against the will of both governments.

"As the claim of a right to withdraw cannot reasonably be deduced from the terms of the treaty, so likewise is it unjustified under international law. Its justification in the present instances, whether at London or at Philadelphia, must, therefore, be sought in moral rather than in legal considerations."

It will be observed that in commenting on the proviso I commended its reasonableness and propriety on the express ground that, without it, "the spectacle might have been witnessed of an international board, consisting wholly of citizens or subjects of one of the contracting parties, deciding the claims made by their own compatriots against the other government," and I added: "Governments are not accustomed to agree to the constitution of arbitral boards of that kind."

On the other hand, I said that it could "hardly be supposed that the governments * * * had it in mind to create a device by which either of them, or the commissioners named by either of them, might, by withdrawing, readily prevent the majority of a duly constituted board from exercising its constitutional powers". It is further to be observed that in the instances above discussed the commissioners did not resign. Had they resigned their office, probably nobody would have contested their right to do so,

or would have claimed that the commission still existed in spite of their resignation. The right of withdrawal, claimed first in London and then in Philadelphia, was purely and simply a claim to prevent the majority of the commission from discharging its functions while still retaining its full membership. Such a claim certainly is not justified on any principle of law, international or otherwise.

Nevertheless, it will be observed that the commission at Philadelphia did not go on with its business and make awards. The work was brought to a standstill. Lord Grenville, the British Secretary for Foreign Affairs, while remonstrating against the course of the United States commissioners in Philadelphia, retaliated by directing the British commissioners in the mixed commission in London to suspend proceedings until the difficulty should be settled.

The quarrel in the commission at Philadelphia went on until July 19, 1799, when the two United States commissioners addressed to the other three commissioners a letter, in which they declared that, on review of what had occurred at the meetings and in the proceedings of the board, they deemed it to be improper for them to give their "further attendance".

Between July 23 and September 4, 1799, there were twelve entries in the Minutes of the Board, each of which set forth that three commissioners "attended as usual for the purpose of forming a board," but that, the two United States Commissioners being absent, "no board could be formed".

When this entry was officially communicated to the two seceding members, they replied that they did not recollect that they had ever said on any occasion "that the board has ceased to exist," and that "they had never held such an opinion." (See my *International Adjudications*, Modern Series, Volume III, pp. 275-277.)

The breach was not healed and the commission came to an end. Its end is recorded in a letter addressed by the majority, on September 30, 1799, to the seceding minority, in which the majority said that their imaginations could not suggest "on what ground of consistency" the minority would ever find itself "at liberty to suffer the majority of the board to decide".

Thus endeth the reading of the story of the commission; and the claims were finally disposed of, not by the majority undertaking to perform the functions of the commission, but by the conclusion between Great Britain and the United States on January 8, 1802, of a treaty or convention under which the British government accepted in full settlement of all the claims the sum of Six Hundred Thousand Pounds (£600,000). The distribution among the British claimants of the money thus paid was made by a British commission, in London.

On the other hand, the convention of January 8, 1802, provided that, upon its signature, the commissioners at London under Article VII of the Jay Treaty, whose proceedings had been suspended as an act of retaliation, should reassemble and proceed with their work under that Article, and this was done.

It is evident that the precedent which Intervener-Respondent has so incompletely cited,—a precedent representing the concurrent opinion and action of both the United States and Great Britain—, is fatal to the contention in support of which it has been invoked. Both the United States and Great Britain concurred in the view that, although the absence of the commissioners, first on one side and then on the other, was deliberate, and was designed to prevent the making of awards, yet it did preclude the making of them, in spite of the fact that the commissioners had not resigned and were still in office.

JOHN BASSETT MOORE.

BLANK PAGE